88-1243

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE GRAND JURY PROCEEDINGS, COMPANY X,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Washington, D.C.

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QUESTIONS PRESENTED

1. Whether the disclosure of an attorney-client communication or work-product document can be compelled under the crime-fraud exception without a finding that the purpose of that communication or document was to further a crime or fraud?

2. Whether the production of a lawyer's litigation files can be compelled under the crime-fraud exception without any *in camera* review of the privileged documents?

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MISCELLANEOUS:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Company X[1] respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on September 16, 1988.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 857 F.2d 710. The order of the United States District Court for the District of Kansas (Kelly, J.) (App. B, *infra*, 7a-13a) is unreported.

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[1] All pleadings in the courts below were filed under seal. Pursuant to instructions obtained from this Court's Clerk's Office: (1) this petition contains the anonymous terms adopted by the Tenth Circuit for the Company and its former law firm; and (2) the district court's memorandum order, which was filed under seal, has been redacted and anonymous terms have been applied to the Company, the law firm and to individuals associated with each. Should the Court require identification of the parties pursuant to Supreme Court Rule 28.1, counsel for Company X will provide that information under seal immediately upon request.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1988. A timely petition for rehearing *en banc* was denied on December 20, 1988 (App. C, *infra*, 14a-15a), whereupon this petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition seeks review of a judgment affirming a district court order compelling the wholesale production to a federal grand jury of privileged attorney-client and work-product documents from the files of lawyers who had represented Company X for ten years in the defense of product liability lawsuits throughout the United States.

The product in question had been marketed in the United States from 1971 until June 1974, when it was withdrawn from the market in the face of questions about its safety. In early 1975, Company X retained Law Firm Y to coordinate the defense against product liability claims for injuries allegedly caused by the product.

Until 1985, Law Firm Y served as national coordinating counsel for more than 100 law firms throughout the nation that represented Company X in approximately 11,000 law suits. During the course of that representation, Law Firm Y and these law firms generated tens of thousands of attorney-client and work-product documents, copies of which were maintained in the litigation files of Law Firm Y. These documents reveal the mental impressions and legal theories of attorneys. They include the most sensitive types of client communications and documents created by attorneys in anticipation of litigation, such as witness interview notes, strategy memoranda, documents regarding prospective expert testimony and draft pleadings.

The Department of Justice began a grand jury investigation in 1986 in the District of Kansas focusing on the conduct of Company X and its attorneys during the marketing of the product and the subsequent litigation. It served two grand jury subpoenas *duces tecum* on Law Firm Y with a total of twenty-eight paragraphs of document demands. The demands address virtually all of the events and documents that had been the focus of the product liability claims against Company X. Fourteen of the paragraphs seek all documents "by, from and to" present or former attorneys of Company X "pertaining to," "regarding" or "relating to" the allegations that had been made against Company X and to Company X documents that had been the key pieces of evidence in the product liability lawsuits. Other paragraphs of the subpoenas expressly demand all documents identified in a 558-page index of privileged documents that Law Firm Y prepared during the tort litigation in 1984-1985 and all documents described in an inventory of Company X's Law Department files that had been prepared in 1982 by a Law Firm Y lawyer.

The district court acknowledged that the twenty-eight paragraphs of the two subpoenas demand "practically everything" in Law Firm Y's litigation files.[2] The breadth of the subpoenas is such that they demand not only communications to and from Law Firm Y and documents created by it, but also communications with and documents created by more than 100 other law firms.

In accordance with a procedure adopted by the district court, Company X asserted privilege claims with respect to the attorney-client and work-product documents in the Law Firm Y litigation files. The government then moved to compel production of all of these subpoenaed privileged documents, alleging that the crime-fraud exception viti-

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[2] (Doc. No. 20, Transcript of Hearing on Motion to Extend Time, filed May 1, 1987, at 10).

ated the attorney-client and work-product privileges protecting such documents. All of the factual allegations in support of the motion were contained in a declaration by one of the prosecutors and exhibits that were submitted *in camera* to the district court. Counsel for Company X were denied access to this *ex parte* submission. They were never advised as to its contents, other than the government's general averments that it showed crimes and fraud by Company X in the marketing and promotion of the product and that Company X used its lawyers to perpetuate those crimes and fraud in defending itself in subsequent litigation.

In support of its motion to compel, the government argued that it was not required to show that the intent or purpose of the subpoenaed communications was to further a crime or fraud, but only had to show that the documents sought bore a reasonable relationship to the crime or fraud alleged in its declaration.[3] The government also argued that no *in camera* review of the privileged documents by the district court was necessary because the subpoena demands were reasonably related to its *ex parte* showing of crime or fraud.[4]

The district court, in an order adopting language proposed by the government, ruled that Company X "is not entitled to assert the work product or attorney-client privilege to prevent production of documents responsive to the subpoenas *duces tecum* as a result of the crime-fraud exception to these privileges." (App. B, *infra*, at 11a). The district court found:

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[3] (Doc. No. 27, Gov't Brief In Support Of Motion To Compel, filed May 22, 1987, at 19, 23). In the court of appeals, the government again argued that the district court did not need to find purpose or intent, but rather that it needed to find only that there was a "reasonable relationship" between the alleged crime or fraud and the documents sought. (Brief of Appellee, filed Mar. 1, 1988, at 14).

[4] (Doc. No. 27, filed May 22, 1987, at 23-24).

> there is *prima facie* evidence that [Company X] and its officers and employees participated in the commission of crimes and fraud during the promotion, marketing and sale of the [Product], and there is *prima facie* evidence that [Company X] used its attorneys to perpetuate these crimes and fraud during the ensuing product liability litigation through the commission of frauds on the courts, obstruction of justice, and perjury. These acts of fraud on the courts, obstruction of justice, and perjury occurring during the period of representation by [Law Firm Y], and the documents sought by the subpoenas are related to that activity.[5]

(App. B, *infra*, at 10a).

There was no finding that any of the subpoenaed communications or work product were made for the purpose of furthering a crime or fraud.

The district court also refused to conduct any *in camera* inspection of the attorney-client and work-product documents before ordering them produced. (App. B, *infra*, at 12a). Without any finding of purpose or any *in camera* review, the district court ordered the wholesale production of all the privileged documents covered by the subpoenas.

The district court acknowledged that there existed serious legal questions concerning its application of the crime-fraud exception and invited appellate review. Accordingly, it stayed production of the privileged documents pending appeal.[6]

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[5] The district court prepared a summary of the evidence on which it relied in making its findings, but this summary was placed under seal and was not made available to petitioner.

[6] Law Firm Y, which no longer represented Company X, was unwilling to resist production and stand in contempt of the district court's order. Company X therefore took an appeal pursuant to the exception to the final judgment rule set forth in *Perlman v. United States*, 247 U.S. 7 (1918). The court below found that it had jurisdiction to hear the appeal. App. A, *infra*, at 4a.

The court of appeals affirmed, acknowledging that the district court's ruling negated "any possible privilege that could be claimed by the Company." (App. A, *infra*, at 4a). Although the district court's order was devoid of any reference to purpose or intent and the government defended that order by arguing that a finding of purpose was not necessary, the court of appeals "construe[d]" the following two lines from the district court's order as constituting a generalized finding of purpose:

> The threshold inquiry is whether the client consulted the attorney in order to aid in the commission or planning of a crime or tort. . . .
>
> . . . .
>
> . . . These [crimes] occurr[ed] during the representation by [Law Firm Y] and the documents sought by the subpoenas are related to that activity.

(App. A, *infra*, at 5a-6a). In affirming, the court of appeals did not require a finding that any of the subpoenaed privileged documents were created for the purpose of furthering a crime or fraud.

The court of appeals also affirmed the district court's refusal to conduct an *in camera* review of any of the privileged litigation documents. The Tenth Circuit cited its earlier decision in *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461 (10th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984). There, in dealing with a client file related to a scheme between the subpoenaed attorney and that client to use public monies for their collective private gain, the Tenth Circuit had held that *in camera* review was not necessary because there was no possibility that any of the privileged documents subject to the crime-fraud production order fell outside the scope of the exception. *See* 723 F.2d at 1467.

Company X argued that *in camera* review was required under *Vargas* because of the virtual certainty

that some of the responsive privileged documents in Law Firm Y's litigation files were created for the legitimate purpose of defending against past acts, and thus fell outside the scope of the crime-fraud exception. Specifically, the instant subpoenas called for all documents "by, from and to" more than 100 law firms that related to the "smoking gun" documents in the tort litigation. The court of appeals, however, did not address this point.

Subsequent to the denial of Company X's petition for rehearing, the district court reaffirmed its belief that its decision raised serious legal questions. The district court denied a government motion to order the immediate production of the privileged documents and extended its stay pending action by this Court on this petition. On January 26, 1989, the court of appeals recalled the mandate and vacated that stay. (App. D, *infra*, 16a).

REASONS FOR GRANTING THE PETITION

A. The Decision Below Compelling The Wholesale Production Of Privileged Litigation Documents Creates An Irreconcilable Conflict Among The Courts Of Appeal Concerning The Proper Application Of The Crime-Fraud Exception.

1. The Tenth Circuit's decision depriving Company X of "any possible privilege" and compelling the production *en masse* of its lawyers' litigation files is in direct conflict with the holdings of the Second, Fifth, Sixth, and Eighth Circuits. All of those courts of appeal require a showing that the purpose or intent of a privileged communication was to further a crime or fraud before its production can be compelled under the crime-fraud exception. *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986); *In re Burlington Northern, Inc.*, 822 F.2d 518, 525 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988); *In re International Sys. & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1243 (5th

Cir. 1982); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986); *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 282-83 (8th Cir. 1984), *cert. dismissed*, 472 U.S. 1022 (1985). *But see In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985) (ruling that specific intent was not a necessary element, but requiring court scrutiny on a question-by-question basis to ensure that all communications regarding prior acts remain protected).

The court below concluded that the district court's findings were adequate for establishing "purpose" because it had found that the alleged crimes occurred during the period of representation by Law Firm Y and the documents sought are related to that activity. (App. A, *infra*, at 5a-6a). Because of this focus on relatedness rather than purpose, the decisions below fail to differentiate between documents created to further a crime or fraud and those intended for the legitimate defense of past acts. Although both may be "related" to alleged criminal or fraudulent activities, the crime-fraud exception applies only to those communications intended to further a crime or fraud. Thus, the focus or relatedness rather than purpose or intent necessarily results in an overbroad application of the crime-fraud exception.

The Fifth Circuit recently has addressed this concern in reversing a similar district court order compelling the wholesale production of privileged documents. It explained:

> The district court erred in ordering discovery without considering whether the specific litigation activities were illegitimate. The attorney/client privilege and work product immunity protect communications and papers generated when a client engages his attorney for legitimate purposes. To the extent the railroads sought out their attorneys to bring lawful suits and consulted with them in connection with such suits, they were within the scope

> of this protection. That the railroads might also have consulted and received the help of their attorneys in connection with other activities that are not lawful does not change this conclusion. *The focus must be narrowed to the specific purpose of the particular communication or document.* To the extent the document deals with a protected activity, it is immune from discovery.

In re Burlington Northern, Inc., 822 F.2d at 525 (emphasis added).

Other circuits have taken this same view. In reversing an order compelling the wholesale production of privileged documents, the Sixth Circuit stated:

> [M]erely because some communications may be related to a crime is not enough to subject that communication to disclosure; the communication must have been made with an intent to further the crime.

In re Antitrust Grand Jury, 805 F.2d at 168.

Several circuits have held that the mere fact that the alleged crime or fraud occurred during the period of representation by a lawyer does not establish the predicate for application of the crime-fraud exception to invade that lawyer's files. The Second Circuit reversed a production order based on the "temporal nexus" between the period of a lawyer's representation and an alleged crime or fraud:

> The crime/fraud exception to the attorney-client privilege cannot be successfully invoked merely upon a showing that the client communicated with counsel while the client was engaged in criminal activity. The exception applies only when there is probable cause to believe that the communications with counsel were *intended* in some way to facilitate or to conceal the criminal activity. While the Johnson affidavit provides a temporal nexus between the alleged crimes and Richard Roe Corporation's communications with its attorneys, it does not support

> a finding that those communications were in furtherance of those crimes.

In re Grand Jury Subpoenas Duces Tecum, 798 F.2d at 34 (emphasis added) (citation omitted). The fact that a crime or fraud may follow the attorney-client communication is insufficient to allow discovery of the communication without a showing of intent. *See Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 282-83 & n.5 (8th Cir. 1984), *cert. dismissed*, 472 U.S. 1022 (1985).

Requiring a showing of purpose under the crime-fraud exception preserves the important societal benefits of the attorney-client privilege and the work-product doctrine. It ensures that the crime-fraud exception will be applied only to those privileged communications which have become part of a crime or fraud. *See Clark v. United States*, 289 U.S. 1, 13-14 (1933). Requiring a finding of purpose also ensures that district courts are circumspect in compelling production of privileged documents, particularly those in a lawyer's litigation files.

2. The court of appeals' decision affirmed the refusal by the district court to conduct any *in camera* review of the privileged documents before it ordered production *en masse*. This blanket waiver approach is in direct conflict with the holdings of other courts of appeal which require *in camera* review by the trial court as a safeguard against an overbroad application of the crime-fraud exception. *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986); *In re Sealed Case*, 754 F.2d 395, 403 (D.C. Cir. 1985); *Cf. Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 280 (8th Cir. 1984), *cert. dismissed*, 472 U.S. 1022 (1985); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036-39 (2d Cir. 1984); *In re Grand Jury Proceedings, FMC Corp.*, 604 F.2d 798, 800 (3d Cir. 1979); *Union Camp Corp. v. Lewis*, 385 F.2d 143, 144 (4th Cir. 1967).

The Sixth Circuit, in *In re Antitrust Grand Jury*, held it to be "plain error" for a court to order the production of privileged documents without reviewing them. As the court explained:

> [T]he only way the district court can determine if any of the documents are subject to a subpoena under the crime-fraud exception is by reviewing them. Ordering production *en masse* creates the potential that some material not within the scope of the crime-fraud exception could be ordered produced.

805 F.2d at 168.

In the case relied on by the government in arguing below that a finding of purpose is unnecessary, *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985), the court nevertheless required a question-by-question *in camera* review where it was alleged that litigation misconduct was used to "cover-up" past acts of crime or fraud. The court stated that, "given the nebulous distinction in this case between prior acts that remain protected by the attorney-client privilege and prior acts forming the basis of the ongoing cover-up that do not, we believe a question-by-question determination is not only appropriate but required by the circumstances." *Id.* at 403. In that case, as here, *in camera* review was essential to distinguish between documents created for the legitimate purpose of defending tort litigation and those allegedly created as part of a "cover-up."

Indeed, the government itself has advocated to this Court the benefits of *in camera* review in determining whether privileged documents should be subject to disclosure pursuant to the crime-fraud exception. In its certiorari petition in *United States v. Zolin*, No. 88-40 (filed July 7, 1988), the Solicitor General cited *In re Antitrust Grand Jury*, 805 F.2d at 168, and argued that "in camera examination of the disputed communication is often the *most reliable* way of determining whether

it is related to a crime or a fraud." Brief at 22 (emphasis in original).

In the *en banc* decision in *Zolin*, the majority did not address the role of *in camera* review in applying the crime-fraud exception. The dissenting judges, however, proposed a rule that would require *in camera* review in the instant case:

> For additional protection of privileged documents —to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera.

United States v. Zolin, 842 F.2d 1135, 1138 (9th Cir.) (dissent) (emphasis in original), *cert. granted*, 109 S. Ct. 257 (1988).

The need for *in camera* review as a safeguard is particularly important where, as here, the finding of *prima facie* crime or fraud is based exclusively on *ex parte* submissions by the government prosecutor. In such circumstances, the district court is deprived of the benefits of the adversarial process, and therefore must independently examine the documents through an *in camera* review in order to protect against an overbroad invasion of the privilege. As the Sixth Circuit stated:

> We are a little confounded as to why the district court did not review the documents *in camera* before ordering them produced. Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made. We find this procedure proper, *particularly when the government's only evidence is grand jury testimony not subject to disclosure.*

In re Antitrust Grand Jury, 805 F.2d at 168 (emphasis added) (citation omitted).

In the instant case, the district court's failure to undertake any *in camera* review will result in an unwarranted invasion of confidential attorney-client communications and work product generated by lawyers in more than 100 law firms between 1975 and 1985. The holding below ignores the distinction between documents created for the purpose of furthering a crime and those created for the legitimate purpose of defending a client against allegations of past wrongdoing. Thus, lawyer communications discussing legitimate litigation strategy issues, including deliberations regarding the use of expert witnesses and evaluations of the merits of and settlement prospects for individual cases, will not be protected from disclosure. This result is contrary to the fundamental principle of the attorney-client privilege—that communications between an attorney and client related to past acts are protected from disclosure. *Alexander v. United States*, 138 U.S. 353, 359-60 (1891); *In re Grand Jury Proceedings, FMC Corp.*, 604 F.2d 798, 804 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977).

B. This Court Should Provide Guidance Concerning The Standards Under Which The Production Of Privileged Lawyer Litigation Files Can Be Compelled Under the Crime-Fraud Exception.

The practice of subpoenaing lawyer files is sharply escalating and has spawned serious concerns within the legal profession.[7] This practice also has resulted in a

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[7] Moscarino & Merkle, *Are Prosecutors Invading The Attorney-Client Relationship?*, 71 A.B.A. J. 38 (1985); Weiner, *Federal Grand Jury Subpoenas To Attorneys: A Proposal For Reform*, 23 Am. Crim. L. Rev. 95 (1985); Peirce & Colamarino, *Defense Counsel As A Witness For The Prosecution: Curbing The Practice Of Issuing Grand Jury Subpoenas To Counsel For Targets Of Investigations*, 36 Hastings L.J. 821 (1985); Fried, *Too High A Price For Truth: The Exception To The Attorney-Client Privilege For Contemplated Crimes And Frauds*, 64 N.C.L. Rev. 443 (1986); Note, *The Grand Jury Subpoena: Is It The Prosecutor's "Ultimate Weapon" Against Defense Attorneys And Their Clients?*, 13 Pepperdine L. Rev. 791 (1986).

rapid increase in the number of reported decisions addressing crime-fraud allegations. These decisions reflect a wide disparity of views among the lower courts, which have not had any guidance from the Supreme Court on these issues since this Court's dictum in *Clark v. United States*, 289 U.S. 1, 15 (1933). It is not surprising, therefore, that there are significant conflicts among the circuits regarding the tests for applying the crime-fraud exception to lawyer files.

This case gives the Court an opportunity to provide guidance by establishing standards and safeguards governing subpoenas issued for lawyer litigation files. The Court, in particular, should resolve the question of whether a showing of purpose and *in camera* review are required before the production of privileged litigation files can be compelled under the crime-fraud exception.

The need for this Court's guidance is particularly great because the attorney-client privilege is "a rule of national application." *United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir.) (dissenting *en banc* opinion), *cert. granted*, 109 S. Ct. 257 (1988). "In addition, the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity." *Id.* Maintaining national uniformity concerning the attorney-client and work-product privileges is especially important for parties involved in multi-district litigation. Like the petitioner here, they are exposed to having their privileges stripped from them in any jurisdiction since grand jury subpoenas may be issued out of any federal district court. Absent uniform standards for applying the crime-fraud exception, prosecutors are free to choose the jurisdiction with the most relaxed standard as their forum for issuing subpoenas to compel the production of lawyers' privileged litigation files.

This Court has determined that the role of *in camera* review in determining whether the crime-fraud exception

can be applied to privileged documents is of sufficient importance to warrant consideration during this Term. On September 27, 1988, the Court granted certiorari in *United States v. Zolin*, 109 S. Ct. 257, to determine whether a *prima facie* showing of crime-fraud for invoking the exception must be established by independent evidence, or, alternatively, may be established by *in camera* inspection of the privileged material. Under the rule advocated by the *en banc* dissent in *Zolin*, *in camera* review by the district court would be required if privileged communications were ordered produced under the crime-fraud exception. The question here—whether the mass production of privileged documents can be ordered under a blanket crime-fraud finding without any *in camera* review—presents the Court with the opportunity to define the precise role of *in camera* review when attorney-client communications and lawyers' work product are subpoenaed.

The issues in this case are of critical importance to the attorney-client relationship and the effective working of the adversary system of justice. This Court has emphasized the paramount importance of protecting the confidentiality of "disclosures by a client to an attorney made in order to obtain legal assistance," *Fisher v. United States*, 425 U.S. 391, 403 (1976), as well as "the giving of professional advice to those who can act on it." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). Similarly, work product, including the mental impressions and thought processes of lawyers, must be protected to insure that lawyers can "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

The decision below provides a precedent for compelling the unwarranted disclosure of an attorney's innermost thoughts without a finding of purpose or any *in camera* review. The consequences of abandoning these safe-

guards are precisely those warned of by this Court in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947):

> An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 27, 1989
Washington, D.C.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1066

IN RE GRAND JURY PROCEEDINGS, COMPANY X,[1]
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Sept. 16, 1988

Rodney O. Thorson (William J. Guzick and Andrew L. Sandler of Skadden, Arps, Slate, Meagher & Flom, Washington, D.C., and Robert J. Roth and Evan J. Olson of Hershberger, Patterson, Jones & Roth, Wichita, Kan., with him on the briefs), for appellant.

Scott J. Glick (Benjamin L. Burgess, Jr., U.S. Atty., D. Kansas, Guy L. Goodwin and Barbara B. Berman, Criminal Div., U.S. Dept. of Justice, Washington D.C., with him on the brief), for appellee.

Before SEYMOUR and McWILLIAMS, Circuit Judges, and BOHANON, Senior District Judge.[2]

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[1] The true identity of the appellant is protected from disclosure by Fed.R.Crim.P. 6(e)(2). The appellant will be referred to as Company X or the Company.

[2] Honorable Luther L. Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

McWILLIAMS, Circuit Judge.

Subpoenas duces tecum were served on Company X and Company X's former counsel (hereinafter Law Firm Y) requiring the production of documents by both the Company and Law Firm Y for use by a District of Kansas federal grand jury which was investigating possible violations of federal laws. Law Firm Y filed a motion to quash the subpoena duces tecum served on it, claiming that the request was burdensome. The district court denied the motion, but the matter was continued to allow the Company opportunity to assert any objections it might have to production by Law Firm Y of the subpoenaed documents. The Company did file objections to the production by Law Firm Y of certain of the documents on the grounds that they came within the attorney-client privilege and the work-product doctrine. Further, the Company also filed objections to its being required to produce certain documents from its own files and records, again claiming attorney-client privilege and the work-product doctrine.

The government next filed a motion to compel the production of documents by both the Company and Law Firm Y. In support of that motion, the government submitted, *in camera*, a partial transcript of the grand jury proceedings, as well as affidavits.[3] Based thereon, the district court, after hearing, granted the motion to compel on August 17, 1987, holding that any possible privilege on the part of either the Company or Law Firm Y was vitiated by the "crime-fraud" exception discussed in *In re Grand Jury Proceedings* (Vargas), 723 F.2d 1461, 1467 (10th Cir.1983). The Company now appeals that

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[3] The Company requested that it be permitted to examine one of the affidavits in order that it might make "meaningful" resistance to the motion to compel. That request was denied on the ground that the affidavit related to the grand jury proceedings.

order.[4] Law Firm Y, however, has not appealed from that order; it would appear from the record that the present position of Law Firm Y is that it will not run the risk of contempt and will now produce the subpoenaed documents. Hence, the present controversy involves only the government and the Company.

The denial of a motion to quash a subpoena is interlocutory in nature and not an appealable order. *United States v. Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed. 2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *In re Grand Jury Proceedings* (Vargas), 723 F.2d 1461 (10th Cir.1983). The same rule of non-appealability would appear to apply to an order granting a motion to compel.[5] In *Vargas*, an attorney was under order of court to appear before a grand jury and at that time produce certain files and records. The appeal by the attorney's client was held by us to be "premature."

The Company argues that the present case comes within an exception to the general rule of non-appealability enunciated in *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918). The government apparently agrees, as it does not argue that this court is without jurisdiction to address the merits on appeal. Law Firm Y having now indicated to the district court that it is currently willing to produce the documents requested from it for grand jury use, the Company must

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[4] The Company's initial appeal of the August 17, 1987, order was dismissed by this court on the grounds that the notice of appeal was not timely filed. *See In re Grand Jury Proceedings, Company X*, 835 F.2d 237 (10th Cir. 1987). Thereafter the Company sought and obtained from the district court an extension of time within which to file the notice of appeal previously filed, and that constitutes the present appeal.

[5] *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 110.13[2], at 153 (2d ed. 1987); *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985).

have the opportunity for appellate review at this time or the opportunity for appellate review of the district court's order to compel *prior* to actual production of the documents for grand jury use will be lost forever. The fact that Law Firm Y is now willing to produce brings the instant case within the *Perlman* exception. In *Vargas*, this court, in holding that the *Perlman* exception did not apply so as to allow appeal by the client, commented as follows:

> Accordingly, we hold that this case is not within that "limited class of cases where denial of immediate review would render impossible any review whatsoever." . . . Thus, the appeal by the community health center is premature. Before it can appeal from Judge Campos' order, it must await a contempt citation against its attorney *or be able to prove that the attorney will produce the records rather than risk contempt.*

Vargas, 723 F.2d at 1466 (emphasis added) (citation omitted).

As indicated, the district court held that any possible privilege that could be claimed by the Company was negated by the "crime-fraud" exception. Specifically, the district court held that the government made a *prima facie* showing that the Company through its employees committed crimes and then used Law Firm Y to cover up and perpetuate those crimes through the commission of a second series of crimes and frauds.[6] The district court correctly applied this exception. The attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud. *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1933). The district court's findings is, in our view, amply supported by the record before us and brings the present

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[6] The trial court properly distinguished between a party who seeks advice from an attorney concerning *past* crime or fraud and a party who consults an attorney to *further* a crime or fraud.

case within our pronouncement in *Vargas*, where, in this connection, we commented as follows:

> Petitioner correctly argues that the government must do more than allege that an attorney is a target of a grand jury investigation to vitiate the privilege. Before the privilege is lost "there must be '*prima facie*' evidence that [the allegation of attorney participation in a crime or fraud] has some foundation in fact." *Id.* Petitioner, however, argues that certain procedures must be followed, including an opportunity for the attorney and client to rebut the prima facie evidence and to be present at any hearing which is intended to establish such a prima facie foundation. . . . Petitioner misconstrues the law in this circuit. As this court held in its opinion *In re September 1975 Grand Jury Term*, 532 F.2d 734 (10th Cir.1976), "[t]he determination of whether the government shows a prima facie foundation in fact for the charge which results in the subpoena lies in the sound discretion of the trial court." *Id.* at 737. In particular, that determination can be made ex-parte and a "preliminary minitrial" is not necessary. *Id.* at 737-38. Furthermore, the prima facie foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury.

Vargas, 723 F.2d at 1467.

Appellant Company argues that the district court erred in applying the crime-fraud exception without first determining that the purpose of the subpoenaed communications was to further a crime or fraud. We disagree with Appellant's interpretation of the district court's August 17, 1987, order. There the district court stated:

> The threshold inquiry is whether the client consulted the attorney in order to aid in the commission or planning of a crime or tort. . . .
>
> . . . .

> . . . These [crimes] occurr[ed] during the representation by [Law Firm Y] and the documents sought by the subpoenas are related to that activity.

We construe this language of the district court's order as complying with *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir.1976), which applied the crime-fraud exception where the purpose of the communication was to further crime or an intended fraud.

The Company's final argument is that the district court erred in failing to undertake at that time an *in camera* review of all the subpoenaed documents. That argument is also answered by *Vargas*, 723 F.2d at 1467, where we spoke as follows:

> Petitioner also alleges that the trial court abused its discretion in not ordering an in camera inspection of the records. However, once the trial judge has concluded that the privilege does not apply because the government has made such a prima facie showing, the trial court need only conduct an in camera inspection of the documents if there is a possibility that some of them may fall outside the scope of the exception to the privilege. After reviewing the scope of the subpoena issued and the nature of the allegations concerning the attorney's involvement, we believe that the scope of the exception to the attorney-client privilege in the case at bar would be sufficiently broad to cover all of the documents requested. . . .

In the instant case, the scope of the subpoenas and the *prima facie* evidence of attorney involvement in the alleged crime and fraud satisfy us that the documents subpoenaed fall within the exception to the attorney-client privilege and need not be individually examined.

JUDGMENT AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JUDGE KELLY

IN RE GRAND JURY PROCEEDINGS:
[COMPANY X] AND [LAW FIRM Y]

ORDER

On this 17 day of August, 1987, this matter comes on upon the motion of the United States to compel the production of documents by [Company X] and [Law Firm Y] to the grand jury in the District of Kansas at Wichita, Kansas; [Company X] appears by its attorneys, Rodney O. Thorson and Richard Roth; [Law Firm Y] appears by its attorneys, John P. Kassebaum and William R. Jentes; and the United States appears by Guy L. Goodwin and Scott J. Glick.

After reviewing the pleadings and documents submitted by the United States in support of the motion to compel, including those documents submitted *in camera*, and after receiving briefs and memoranda of law from the parties and hearing arguments of counsel, the court finds:

The federal grand jury is investigating violations of federal laws, including 18 U.S.C. § 1341, 18 U.S.C. § 1343, 18 U.S.C. §1503, 18 U.S.C. § 1505, 18 U.S.C. § 1623, 18 U.S.C. § 1371, and 18 U.S.C. § 1962, involving the activities of [Company X] and its officers and

employees during the marketing of [the Product], and during the resulting litigation in numerous state and federal courts in the District of Kansas and elsewhere. Evidence before the grand jury which describes in detail the conduct of the employees and officers of [Company X] who are the subjects of the grand jury's investigation is set forth in the *in camera* declaration of Scott J. Glick, which was submitted by the government in support of this motion to compel. The content of the affidavit appears to be an accurate representation and account of the grand jury proceedings.

Grand jury subpoenas *duces tecum* dated November 3, 1986 and March 12, 1987 were served on [Company X] and [Mr. A] of [Law Firm Y], directing that [Mr. B], or the custodian of records of [Company X], and [Mr. A], or the custodian of records of [Law Firm Y], produce to the grand jury in the District of Kansas documents which relate to the matters under investigation by the grand jury. The subpoenaed law firm, [Law Firm Y], represented [Company X] in its nationwide defense of the [] product liability litigation.

On March 10, 1987 and April 29, 1987, [Mr. C], [Company X's] vice president for administrative services, appeared before the grand jury in response to the subpoenas, and he asserted the attorney-client privilege as to certain subpoenaed documents. On March 30, 1987, by affidavit of [Mr. D], [Law Firm Y] objected to the production of certain of the subpoenaed documents, in part on the ground that the documents were work product. On May 1, 1987, [Company X], through its attorneys, asserted the attorney-client privilege and claimed work product to some, but not all, of the documents subpoenaed from [Law Firm Y]. The remaining documents responsive to the subpoenas, to which no privilege was asserted, were not produced at that time, but the court has since stayed all production and put in place a procedure to test the propriety of the privilege claims.

The basis of the government's motion to compel is that the crime or fraud exception applies, thereby removing any privilege that might otherwise be available to [Company X] or its attorneys. Although [Law Firm Y] does oppose the government's motion, it does not claim privilege on its own behalf; only [Company X] asserts the privilege.

The standards governing the crime or fraud exception to the work product doctrine and the attorney-client privilege were set forth by the Tenth Circuit in *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983):

> The privilege does not apply where the client consults an attorney to further a crime or fraud . . . . Before the privilege is lost "there must be 'prima facie' evidence that [the allegation of attorney participation in a crime or fraud] has some foundation in fact." . . . As this court held in its opinion In re September 1975 Grand Jury Term, 532 F.2d 734 (10th Cir. 1976), '[t]he determination of whether the [party] shows a prima facie foundation in fact for the charge . . . lies in the sound discretion of the trial court."

The threshold inquiry is whether the client consulted the attorney in order to aid in the commission or planning of a crime or tort. *In re [Company X]*, 107 F.R.D. 2, 9 (D. Kan. 1985). Obviously, the privilege is not destroyed when a client seeks advice about a *past* crime or fraud. *Id.* It is the *continuing* nature of the wrongful conduct which will destroy the privilege.

At this stage, the court need only find whether there is *prima facie* evidence of crime or fraud—the court need not formulate any opinions about the actual merits of the assertions of crime or fraud. In *Clark v. United States*, 289 U.S. 1, 53 (1933), the Supreme Court described the burden which the government must satisfy:

> To drive the privilege away, there must be "something to give colour to the charge;" there must be "prima facie evidence that it has some foundation in fact." . . . When that evidence is supplied, the seal of secrecy is broken.

Prima facie evidence is evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud. *In re Sealed Case*, 754 F.2d 395, 401 (D.C. Cir. 1985). It is a matter within the court's discretion to determine whether there is *prima facie* evidence in a given case. *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467.

After reviewing the *in camera* declaration of Scott J. Glick, as well as all *in camera* exhibits and grand jury testimony, the court finds there is *prima facie* evidence that [Company X] and its officers and employees participated in the commission of crimes and fraud during the promotion, marketing and sale of [the Product], and there is *prima facie* evidence that [Company X] used its attorneys to perpetuate these crimes and fraud during the ensuing product liability litigation through the commission of frauds on the courts, obstruction of justice, and perjury. These acts of fraud on the courts, obstruction of justice, and perjury occurring during the period of representation by [Law Firm Y], and the documents sought by the subpoenas are related to that activity.

While not binding here, other courts examining part of the same evidence as that presented to the grand jury and described in the *in camera* declaration have found that the crime-fraud exception precluded claims of attorney-client privilege and work product by [Company X]. The Honorable Frank G. Theis, in *In re [Company X]*, 107 F.R.D. 1, 14 (D. Kan. 1985), specifically found that a *prima facie* showing of crime and fraud by [Company X] had been made and that its attorneys were used to perpetuate the crime and fraud. This finding was made

on the basis of less evidence than is currently available to the grand jury as described in the *in camera* declaration of Scott J. Glick. The court held that the attorney-client privilege and work product claim were therefore not available to shield the particular documents sought from production. In *Goss, et al. v.* [*Company X*], No. 81-1285 (D. Kan. Jan. 28, 1985), Magistrate John B. Wooley, in an unpublished opinion, held that sufficient evidence had been presented to link [Company X] and its in-house counsel to fraud and misrepresentations and thus vitiate the attorney-client privilege and work product claims. In *Craig v.* [*Company X*], 790 F.2d 1, 3-4 (1st Cir. 1986), the court upheld a showing of "continuing fraudulent misrepresentation and cover-up" by [Company X] sufficient to vitiate the attorney-client privilege and work product immunity. In *Hewitt, et al v.* [*Company X*], No. 3-83-1291 (D. Minn. Feb. 21, 1985), Report II of Special Masters, the masters found a strong *prima facie* case that [Company X], with the participation of its in-house counsel, had engaged in an ongoing fraud which included the destruction and withholding of relevant evidence. The special masters found the attorney-client privilege and work product claim were therefore not available to protect documents related to this fraud from production.

Accordingly, the court finds that [Company X] is not entitled to assert the work product or attorney-client privilege to prevent production of documents responsive to the subpoenas *duces tecum* as a result of the crime-fraud exception to these privileges. The *in camera* submissions contain a strong *prima facie* showing that [Company X] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing and sale of [the Product], and used its attorneys to perpetuate and cover up these ongoing crimes and fraud during the ensuing product liability litigation through the commisison of frauds on the court, obstruction of justice and perjury. The documents sought by

the subpoenas relate to this activity and are not protected by the attorney-client privilege or work product claims.

The court further finds that the documents sought in the subpoenas *duces tecum* bear a reasonable relationship to the crimes and frauds described in the *in camera* declaration, and there is no necessity for this court to conduct an examination of documents responsive to the subpoenas for that purpose. *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983), *cert. denied*, 105 S.Ct. 90; *In re September 1975 Grand Jury Term*, 532 F.2d 734, 738 (10th Cir. 1976). A summary of the evidence upon which the court has relied in making its findings is attached and will remain sealed.

IT IS THEREFORE ORDERED that the attorney-client privilege and work product doctrine cannot be invoked by [Company X] to prevent production to the grand jury of documents described in the grand jury subpoenas dated November 3, 1986 and March 12, 1987, to [Law Firm Y] and [Company X].

IT IS FURTHER ORDERED that [Law Firm Y] and [Company X] are hereby ordered to produce to the grand jury the documents to which the attorney-client privilege or work product doctrine have previously been asserted.

IT IS FURTHER ORDERED that this court's orders of April 30, 1987 and June 19, 1987, staying production of nonprivileged documents, are hereby vacated, and [Company X] and [Law Firm Y] shall produce to the grand jury all documents which are responsive to the subpoenas which have not previously been identified or claimed to be privileged. No attorney-client privilege or work product claims shall be asserted to any documents which are responsive to the subpoenas.

It is the court's intention to direct production of all of the subpoenaed documents in a timely and yet orderly

way. In this, counsel for the litigants shall meet forthwith at some convenient place in Richmond, Virginia, for the purpose of coordinating production of the subpoenaed documents. It is contemplated they will, in turn, communicate with the Honorable Robert Merhige, of the U.S. District Court, Eastern District of Virginia, and deliver to him a copy of this order, as copies of certain exhibits on deposit in the Ross Building are contemplated for production here. Counsel for the United States will identify for production that which they determine of prime importance, and on the next scheduled grand jury session to be held within 15 days of the date of this order, [Mr. A] or the custodian of records of [Law Firm Y], and [Mr. B] or the custodian of records of [Company X] shall appear at 9:30 A.M. to produce the documents which the government has identified.

IT IS FURTHER ORDERED that copies of this order shall, by counsel for [Company X] and [Law Firm Y], be personally delivered to [Mr. B], president of [Company X], and to [Mr. A], of [Law Firm Y].

IT IS FURTHER ORDERED that should [Mr. B] and/or [Mr. A], or their respective custodians, not produce in the grand jury all documents responsive to the grand jury subpoenas as ordered herein, the grand jury shall continue in session; however, [Mr. B] and [Mr. A] will personally appear before this court at 2:00 P.M. on the same day to show cause why the court should not hold them in contempt pursuant to 28 U.S.C. § 1826.

DATED this 17 day of August, 1987.

/s/ Patrick F. Kelly
PATRICK F. KELLY
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

December 20, 1988

Before Honorable William J. Holloway, Jr., Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Luther L. Bohanon, District Judge.*

No. 88-1066

IN RE GRAND JURY PROCEEDINGS, COMPANY X,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

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* The Honorable Luther L. Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. It is further ordered the mandate shall issue forthwith.

ROBERT L. HOECKER
Clerk

By: Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January 26, 1989

Before: Honorable Stephanie K. Seymour and Honorable Robert H. McWilliams, Circuit Judges and Honorable Luther L. Bohanon, District Judge.*

No. 88-1066
DC No. 87-10069A-01

IN RE GRAND JURY PROCEEDINGS, COMPANY X,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee,

On consideration of the motion and response of Company X, the Government's motion to recall and clarify the mandate is granted. The mandate is recalled. The district court is ordered to vacate any and all stays heretofore entered by it. This mandate shall reissue forthwith.

ROBERT L. HOECKER
Clerk of Court

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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* The Honorable Luther L. Bohanon of the United States District Courts for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.